deprivations of rights secured by the United States Constitution. *Yanaki v. Iomed, Inc.*, 319 F. Supp. 2d 1261, 1264 n.7 (D. Utah 2004): "If there was a sufficient basis for finding that Defendants' actions in this case were committed under color of state law, this Court would find that Plaintiffs were deprived of a right secured by the 'Constitution and Laws' of the United States." App. 38a-39a

The district court stated, however, that the courts "have been extremely reluctant to extend liability under § 1983 to private litigants making use of the constitutionally valid tools provided them by state law." 319 F.Supp. 2d at 1265. The district court, in its analysis of *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982), analogized the action to "an assault and battery committed by a private citizen on a public sidewalk [that] does not involve state action for § 1983 purposes." *Id.* n.8. App. 39a-40a The district court ruled that "The inappropriate use by private litigants of a constitutional statute or rule does not constitute state action for the purposes of § 1983." 319 F. Supp. 2d at 1265. App. 31a. The district court then held that the complaint did not state a claim because "neither the pleadings nor the facts of the case before the Court support an argument that the statute under which the state judge issued the Search Order was unconstitutional or that the state court proceedings of which the Search Order is a part were a complete nullity, [at least one of which is required to support] the element of state action requisite to sustain an action under § 1983." *Id.* at 1266. App. 33a The district court thereupon declined to exercise supplemental jurisdiction over petitioners' state-law claims.

3. Tenth Circuit Opinion. The majority opinion of the court of appeals affirmed the district court, holding: "Without a challenge to the constitutionality of the underlying state laws or any suggestion of a conspiracy between Defendants and the police, the actions of the police in discharging their official duties do not distinguish Plaintiffs' claims from the claim rejected in *Lugar*." App. 9a A vigorous dissenting opinion challenged the majority opinion's reading of *Lugar*, and pointed out that the majority had overlooked this Court's instruction that: "The first prong of the *Lugar* test--that the deprivation of a right is attributable to the state--is satisfied when 'the authority of state officials . . . put the weight of the State behind Defendant's private decision[.]' *Lugar*, 457 U.S. at 940, 102 S.Ct. 2744." *See* App. 18a. The dissent also argued that the majority opinion had not construed the allegations of the complaint according to the proper standard set by this Court:

> The allegations here cannot be so parsed against the non-moving parties. They must be read instead under the Supreme Court's teaching in *Conley v. Gibson*, 355 U.S. at 45-46, 78 S.Ct. 99, to see whether some set of facts might be shown to entitle the non-moving parties to relief. And under *Lugar*, 457 U.S. at 941, 102 S.Ct. 2744, private parties' (like Iomed's lawyers) 'joint participation with state officials' (like Kopp and Herlin) was sufficient to characterize the private parties as state actors for purposes of the Fourteenth Amendment.

See App. 24a-25a n. 4. The dissent also pointed out that the majority opinion was in direct conflict with precedent from at least one other circuit court of appeals opinion,

Howerton v. Gabica, 708 F.2d 380 (9th Cir.1983), in which the Ninth Circuit held that the use of the police by private parties to facilitate an illegal repossession would constitute "state action." *See* 415 F.3d at 1214 (Holloway, S.J., dissenting)(quoting *Howerton*). *See* App. 24a-25a n. 4

REASONS FOR GRANTING THE PETITION

A. The Questions Presented Are Important Questions of Federal Law as to Which the Tenth Circuit's Opinion Conflicts with this Court's Precedent and the Questions Are Likely to Recur.

The protections of the Fourth Amendment against unreasonable searches and seizures by the government have long been recognized by the Court as of utmost importance to our free society. The Fourth Amendment, in its text, expressly protects the right of the people from unreasonable searches and seizures of their homes and papers by the federal government. The Fourteenth Amendment extended that protection against unreasonable searches and seizures conducted by the States. *See Wolf v. Colorado*, 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949)("The security of one's privacy against arbitrary intrusion by the police-which is at the core of the Fourth Amendment-is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. . . . Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."), *overruled on other grounds*, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081

(1961). The questions presented in this case involve precisely these important questions of federal law.

This case involves a search of a private home, not any commercial establishment. This Court has emphasized the especially important protections afforded by the Fourth Amendment to privacy interests in the sanctity of private dwellings:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home - a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[at] the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." . . . In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U. S. 573, 589-90 (1980)(citation omitted). "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Id.* at 586. Indeed, a search and seizure carried out in the home "without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully

defined set of exceptions based on the presence 'exigent circumstances.'" *Id.* n. 25 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971)). Only two circumstances exist where the sanctity of that constitutional privacy interest in the home would yield to governmental intrusion without a valid search warrant, namely, (1) consent; or (2) exigent circumstances. *See Donovan v. Dewey*, 452 U.S. 594, 598 n.6, 101 S.Ct. 2534, 2538 n.6, 69 L.Ed.2d 262 (1980). Neither circumstance existed in this case.

Congress provided a remedy for persons injured by deprivations of such rights under color of law in 42 U.S.C. § 1983. The plain wording of 42 U.S.C. § 1983 makes liable "[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of any state ... subjects ***or causes to be subjected,*** any citizen ... to the deprivation of any rights ... secured by the Constitution and laws . . .." *Id.* (emphasis added). Congress deliberately made this protection broad, for the very reason that the provision of a federal remedy was such an important protection in federal law. The history of the expansive and remedial nature of this statute is set forth in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled on other grounds, Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *Monroe* reiterated the long-standing rule that an act need not be pursuant to a state law in order to be "under color of law." *Id.*, 365 U.S. at 184, 81 S.Ct. at 482-83. To the contrary, the Court reconfirmed that "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.'" *Id.*, 365 U.S. at 184, 81 S.Ct. at 482 (quoting *United States v. Classic*, 313 U.S. 299, 326, 61

S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941). The "misuse of power" at issue in *Monroe*, like here, was police conduct of a search and seizure at a private home. *Id.*, 365 U.S. at 171, 81 S.Ct. at 476. Private parties who cause constitutional deprivations unequivocally have no immunity from liability under 42 U.S.C. § 1983. *Wyatt v. Cole*, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992). The complaint here alleged just such a successful conspiracy to cause a constitutional deprivation by the police.

The principles were further discussed in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). There, the plaintiff was a debtor of the defendant, who had sued plaintiff and sought a prejudgment writ of attachment of certain of plaintiff's property in state court, in accordance with Virginia law. *See id.*, 457 U.S. at 924-25, 102 S.Ct. at 2747. The plaintiff alleged that the defendants had acted jointly with the state to deprive him of his property without due process of law. *See id.* This Court set forth the statement of the issue in *Lugar* as follows: "[W]hether the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within contemplation of § 1983." *Id.*, 457 U.S. at 926, 102 S.Ct. at 2748. The court of appeals had held "that a private party acts under color of state law within the meaning of § 1983 only when there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant

degree." *Id.* This Court found that the court of appeals' decision was "difficult to reconcile with the Court's garnishment and prejudgment attachment cases and with the congressional purpose in enacting § 1983." *Id.*, 457 U.S. at 932, 102 S.Ct. at 2751. The Court then went on to summarize some of those decisions, characterizing them as "cases in which a private decision to invoke a presumptively valid state legal process has been held to be state action." *Id.*, 457 U.S. at 933 n. 16, 102 S.Ct. at 2752 n. 16.

The Court stated: "[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as 'state actor' for purposes of the Fourteenth Amendment." *Id.*, 457 U.S. at 941, 102 S.Ct. at 2756. The Court specifically found that the court of appeals "erred in holding that in this context 'joint participation' required something more than invoking the aid of state officials to take advantage of state-created attachment procedures." *Id.*, 457 U.S. at 942, 102 S.Ct. at 2756. The Court went on to state that, "[w]hatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute." *Id.*. That precedent is directly on point with this case and was not followed by the Tenth Circuit.

In this case, the participation of the police went beyond merely conducting the search and seizure. Instead, Officer Kopp threatened to kick in Moss' door, he surveilled the property while allowing Matkin to get an additional order that authorized the use of the force and gave Officer Kopp the power to "detain" anyone who interfered with him; Officer Kopp also called a backup

police officer, who also arrived at the scene to further solidify this display of state power. This is certainly not some passive and uninvolved service of papers. Instead, it is a full-blown show of force to effectuate an unconstitutional search and seizure, under the badge and authority of state law and utilizing that badge of authority to intimidate, successfully, Moss. The availability of the important federal remedy of 42 U.S.C. § 1983, 1988 must be soundly reaffirmed by this Court, given the holding by the Tenth Circuit that a private party who causes the police to commit a constitutional deprivation is not subject to such remedy.

The Tenth Circuit proffered a dangerous point of distinction from *Monroe*, stating: "In this case, the conduct of the police does not fall under the abuse of authority doctrine of *Monroe* because the police, in executing the court order, were merely discharging their statutory duties." The Tenth Circuit did not explain, and cited no authority to support, the conclusion that a constitutional deprivation by the police is not "state action" if it is conducted pursuant to a civil order. Indeed, the police are "merely discharging their statutory duties" when they serve an invalid search warrant. The majority opinion seems to imply that the police have no discretion to disobey an unconstitutional civil order. This Court has recently reversed the Tenth Circuit on just that issue, holding that the police have discretion to disobey even apparently mandatory orders. *See Town of Castle Rock v. Gonzales*, 125 S.Ct. 2796, 2806-08, 73 U.S.L.W. 4611 (2005)("After the warrant is sought, it remains within the discretion of a judge whether to grant it, and after it is granted, it remains within the discretion of the police whether and when to execute it."). The majority's dangerous point of distinction from *Monroe* cannot be

allowed to stand, or else there would never be "state action" when the police commit a constitutional deprivation pursuant to any order in discharging their statutory duties.

The fact patterns giving rise to cases that require a federal civil rights remedy for unconstitutional searches and seizures have existed in the past and will continue into the foreseeable future. The decision of the court of appeals denying a federal remedy has already drawn great interest in the fields of employment law and civil rights law. An authoritative treatise on employment law highlights the absence of a federal remedy against former employers in these circumstances, based on this case. *See* L. CAMILLE HERBERT, EMPLOYEE PRIVACY LAW § 8:3 (Clark Boardman1993 & Thomson/West Update 2005)(the author cites the court of appeals' decision as standing for the proposition that a search and seizure by the police do not constitute "state action," but rather, just a "private misuse of state law by the employer.") Employment lawyers outside the Tenth Circuit have taken notice of the decision. For example, one writer concluded:

> The court held that the state's actions in threatening to kick in the employee's door, conducting the search, and seizing the former employee's belongings did not amount to state action. Under the Court's reasoning, this outcome is mandated because the state was merely assisting a private entity. The degree of assistance was not relevant to the majority. If you take the opinion to its logical extreme, the decision would not have been different if the officer had held the employee at gunpoint during the course of the search or even shot him.

THE EMPLOYMENT LAW BULLETIN, Thursday, Aug. 4, 2005, at http://texasemploymentlaw.blogspot.com/2005/08/tenth-circuit-appears-to-endorse.html. With respect to Civil Rights law, the district court's decision has been cited in 15 AM. JUR.2d *Civil Rights*, § 73 (2005 Update), for the proposition that the police search and seizure "w[ere] not caused by use of a privilege created by state, and thus w[ere] not state action." *Id.* That treatise goes on to cite the district court decision again, implying that the police search and seizure was immaterial: "The inappropriate use by private litigants of a constitutional statute or rule [to cause a constitutional deprivation by the police] does not constitute state action for the purposes of § 1983." *Id.* § 76. Even the courts have begun to suggest that the case stands for the proposition that the conduct in the case constitutes "mere acquiescence of a state official in the actions of a private party" which is insufficient to invoke a federal remedy against the private party. *See Anderson v. Blake*, available on WESTLAW, 2005 WL 2716302, at *3 (W.D. Okla. Oct. 21, 2005).

The specter of ex-employer private litigants using the police to commit unconstitutional searches and seizures, if no federal remedy is available, and especially one that allows for attorneys fees, is not imaginary. Indeed, at the district court level, the respondents in this very case attempted to convince the district court that the search and seizure were reasonable, arguing:

> In cases involving similar facts, searches and seizures have been authorized by courts of the State of Utah, this Court, and other state and federal courts. *See, e.g., Novell Inc. v. Timpanogos Research Group, Inc.*, 46 U.S.P.Q.2d 1197, 1998 WL 177721 (Utah Dist. Ct. 1998); *Envirotech Corp.*

v. Callahan, 872 P.2d 487 (Utah App. 1994); *Forro Precision, Inc. v. I.B.M. Corp.*, 673 F.2d 1045 (9th Cir. 1982). *See also* unreported Order to Seize and Impound Copies of Defendants' Computer Hard-Drives and Floppy Diskettes (dated May 13, 1997), *EIMCO Process Equipment Co. v. Foresight Technologies, Inc.*, Case No. 2:97CV)375B (D. Utah).

See Memorandum in Support of Motion to Dismiss, at 8 n.2. The Tenth Circuit's imprimatur can only result in private employers continuing such abuses, seeking out the police to conduct unconstitutional searches and seizures on their behalf, unless corrected by this Court.

Finally, review is essential to undo the heightened pleading standard that the Tenth Circuit opinion now imposes in civil rights cases like this one. The majority opinion relied on *Lugar* to impose a pleading requirement that, in order to state a claim, required petitioners to allege either that some particular state statute was unconstitutional or that, using the word "conspiracy," there was a "conspiracy" between either the police or judge and the private parties. This pleading requirement is not only contrary to *Monroe*, as to the substantive law of what constitutes state action, it is also contrary to the notice pleading requirements of FED. R. CIV. P. 8 and this Court's precedent interpreting those requirements.

As the dissenting opinion below pointed out, the parsing of the allegations of the Complaint, requiring the pleading with particularity of facial unconstitutionality of the state laws the judge relied on in issuing his order, or requiring an allegation of "conspiracy" between the respondents and the police or judge, are not consistent

with notice pleading standards and constitute the establishment of a pleading standard in the Tenth Circuit of particularity for civil rights claims. *See* App. 24a-25a n. 4. This is contrary to this Court's precedent in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1955). Petitioners add to that controlling rule of law this Court's decisions in *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 , 40 L.Ed.2d 90 (1974)("Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.), *overruled on other grounds, Harlow v. Fitzgerald*, 457 U.S. 800, 814-15, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982); and *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515, 122 S.Ct. 992, 999, 152 L.Ed.2d 1 (2002)(no requirement under FED. R. CIV. P. 8(a) that plaintiff plead a prima facie case to survive motion to dismiss).

A heightened standard for civil rights actions, such as the pleading requirement the Tenth Circuit imposed on this civil rights claim, was plainly rejected in *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). The court of appeals has attempted to begin engrafting new particularity standards for civil rights claims and, in accordance with *Crawford-El*, that should be firmly rejected, lest it begin to form a new trend in the lower courts. The combined effect of a ruling heightening the pleading standard for civil rights claims and rejecting police action as state action must not be allowed to affect the many cases that will follow this one or to encourage illegal conduct by the police at the behest of private litigants. Petitioners respectfully request review.

B. The Tenth Circuit opinion is also in conflict with decisions of the United States Courts of Appeal for the Seventh and Ninth Circuits.

In conflict with the Tenth Circuit opinion here, the Seventh Circuit correctly set forth the analysis of the degree of police involvement in determining the existence of "state action:"

> Although minor involvement by a state actor does not collapse the two parts into one, the Lugar opinion clearly suggests that the Supreme Court did not intend to abolish the *Monroe v. Pape* abuse of authority doctrine. *See Lugar*, 457 U.S. at 940, 102 S.Ct. at 2755; *Monroe v. Pape*, 365 U.S. 167, 184-87, 81 S.Ct. 473, 482-84, 5 L.Ed.2d 492 (1961). In fact, the Court cited *Monroe v. Pape* as an example of when the two prongs of *Lugar* (state causation and state actor) collapse into one. *Lugar*, 457 U.S. at 937, 102 S.Ct. 2753-54. Thus, *even if a private party misuses a state statute, the deprivation can still be under color of state law if the authority of state officials puts the weight of the State behind the private decision.*

Greco v. Guss, 775 F.2d 161, 167 (7th Cir. 1985) (emphasis added). The dissenting opinion recites the police threat to kick in the door of the home and specific cooperation with the private parties as showing state action. *See* App. 20a. Petitioners add that Moss would not even have opened her door, had it not been for the badge of authority presented by the police in pursuing the constitutional deprivation. Nor can it be ignored that she was subject to a threat of being "detained" if she tried to stop the search and seizure. The police involvement here

was not minimal, but overt, deliberate and plainly calculated to effect the constitutional deprivation that the police in fact committed.

Another circuit court of appeals' decision is also in conflict with the Tenth Circuit. The dissenting opinion below expounded at length on *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), a case which it found in conflict with the majority opinion. App. 21a. In *Howerton*, a landlord evicted his tenants, with significant assistance from the police. There was no allegation of unconstitutionality regarding any underlying state law which would have allowed the eviction. Indeed, the tenants contended that the eviction in Howerton was illegal under state law. *See Howerton*, 708 F.2d at 381. The dissenting opinion pointed out that the Ninth Circuit noted:

> This case involves more than a single incident of police consent to "stand by" in case of trouble. Police were on the scene at each step of the eviction. Mr. Gabica testified that the police presence gave him the feeling he had the right to cut off the utilities. Moreover, the police officer actively intervened--he privately approached the Howertons and recommended that they leave the trailerhouse.

Id. at 384; App. 21a.. The dissenting opinion quoted the Ninth Circuit further:

> The Supreme Court in a 1983 action has affirmed a judgment against a private party where state agents seized the plaintiff's property, the agents acting pursuant to statute upon the private

> party's ex parte application. *E.g., Fuentes v. Shevin*, 407 U.S. 67 (1972). *See also Lugar[,]* [457 U.S. at 934]. On the other hand, a private repossession pursuant to a state statutory provision is not state action. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164-66 (1978). In this case, the Howertons claim the Gabicas chose a middle road, using the police to facilitate an illegal repossession. If true, we think this constituted state action.

Id.; App. 21a-22a. The dissenting opinion is correct that the Tenth Circuit majority opinion here is in clear conflict with *Howerton*, from the Ninth Circuit. The majority opinion attempted to distinguish *Howerton* by stating: "Here, the police involvement was caused solely by the issuance of the state court order and not by the private Defendants seeking out the police officers in aid of their private agenda." That point of distinction overlooks the fundamental fact that the police committed the constitutional deprivation. Under *Monroe*, that is an abuse of authority.

This Court should grant certiorari to ensure that its decision in *Lugar* is applied consistently in accordance with its intent. The Court should resolve the conflict between the circuits and should reaffirm that a constitutional deprivation committed by the police is within the rule of *Monroe v. Pape*, as interpreted in *Howerton* and *Greco*. The Court should hold that abuse of government power, such as here, by the police, is "state action" that supports a claim under 42 U.S.C. § 1983 and that there is no requirement to plead with particularity the unconstitutionality of a state statute or a "conspiracy" between the private parties and the police or judge. The

need for resolving this issue appropriately is particularly exigent because litigation between employers and their ex-employees, over such issues as trade secret and confidential information, is commonplace and this constitutional abuse will continue in other such actions if not stopped by this Court.

CONCLUSION

For the reasons stated above, the petitioners' petition for a writ of certiorari should be granted.

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(any footnotes trail end of each document)

No. 04-4061

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMAL YANAKI; SUSAN I. MOSS,
Plaintiffs-Appellants,

v.

IOMED, INC., a publically-held Utah corporation; ROBERT J. LOLLINI; MARY CROWTHER; LAURA MILLAR; PARR, WADDOUPS, BROWN, GEE & LOVELESS, a Utah professional corporation; CLARK WADDOUPS; JONATHAN O. HAFEN; JUSTIN P. MATKIN; OFFICE EQUIPMENT ASSOCIATES, a closely-held Utah corporation, doing business as OfficeWare; and SCOTT L. JOHNSON,
Defendants-Appellees.

July 26, 2005, Filed

COUNSEL: David W. Scofield, Peters, Scofield, Price, Salt Lake City, Utah, for Plaintiffs-Appellants.

David M. Bennion (Michael L. Larsen, with him on the brief), Parsons, Behle & Latimer, Salt Lake City, Utah, for Defendants-Appellees.

JUDGES: Before BRISCOE, HOLLOWAY, and MURPHY, Circuit Judges. HOLLOWAY, Circuit Judge, dissenting.

OPINION BY: MURPHY

OPINION: MURPHY, Circuit Judge.

I. INTRODUCTION

As part of an action in state court, Iomed, Inc. sought and obtained an *ex parte* order directing local police, with the assistance of Iomed, to execute a search of Jamal Yanaki's residence. After the search was executed and various items seized, Yanaki and Susan Moss filed a civil rights suit under 42 U.S.C. § 1983 against Iomed, several Iomed employees, lawyers for Iomed, and various other private actors. Plaintiffs' complaint alleges deprivations of their rights to be free from unreasonable searches and seizures, infringement of their procedural and substantive due process rights, and several state law claims. The district court granted Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) and Plaintiffs now appeal. This court exercises jurisdiction pursuant to 28 U.S.C. § 1291. Because we conclude that Plaintiffs have failed to allege a deprivation of rights committed under color of state law, we affirm the district court's dismissal for failure to state a claim.

II. BACKGROUND [1]

On April 9, 2002, Iomed, Inc. filed a complaint in Utah

state court against Yanaki, a former Iomed employee, alleging a variety of injuries including misappropriation of trade secrets and breach of a confidentiality agreement. The following day, Iomed filed an *ex parte* motion seeking an order permitting immediate discovery to prevent the destruction of evidence (the "Search Order"). On April 12 lawyers for Iomed appeared before a state court judge *ex parte* and argued the motion. The court granted Iomed's motion and issued the Search Order which, in relevant part, directed the Salt Lake County Sheriff's Office, with the assistance of Iomed, to execute the Search Order at Yanaki's home and take into custody all hard drives and other electronic storage media. [2]

On the morning of April 15 Justin Matkin, a lawyer for Iomed, arrived at Yanaki's home accompanied by Salt Lake County Deputy Sheriff Heinz Kopp. Moss answered the door and was served with the Search Order. Moss refused to allow Matkin and Kopp into the home because Yanaki was not present at the time. Kopp remained outside the home while Matkin returned to the state court judge to secure an *ex parte* writ of assistance. The judge issued a Supplemental Order in Aid of Enforcement (the "Enforcement Order") which directed and authorized the Salt Lake County Sheriff's Office to enter Yanaki's residence and to use reasonable force, if necessary and appropriate, to execute the Search Order.

Matkin returned to Yanaki's home with the Enforcement Order, and Matkin and Kopp, along with Mary Crowther and Scott Johnson, entered Yanaki's

home and commenced the search. Shortly thereafter a second police officer, Sergeant Kendra Herlin, arrived to assist. Pursuant to the Search Order, officers seized Moss and Yanaki's computer and other materials belonging to them, including Yanaki's University of Utah Executive MBA Program materials, various other papers and effects Yanaki had packed upon leaving Iomed, and a CD-ROM belonging to Ceramatec, Inc., a client of Yanaki's consulting business.

On April 14, 2003, Yanaki and Moss filed separate complaints in United States District Court for the District of Utah seeking relief under 42 U.S.C. § 1983.[3] In their complaints, which were subsequently consolidated, Plaintiffs alleged that the search of their residence violated their Fourth Amendment rights to be free from unreasonable searches and seizures and their procedural and substantive due process rights under the Fifth and Fourteenth Amendments.[4]

The district court granted Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The court concluded that Plaintiffs' pleadings did not support the element of state action required to bring a claim under § 1983. The court then declined to exercise supplemental jurisdiction over Plaintiffs' remaining state claims. Yanaki and Moss filed a timely notice of appeal challenging the district court's order granting Defendants' motion to dismiss.

III. STANDARD OF REVIEW

This court reviews a Rule 12(b)(6) dismissal *de novo*,

accepting all well-pleaded facts as true and in the light most favorable to the nonmoving party. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). "A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quotation omitted).

IV. DISCUSSION

To state a claim under § 1983,[5] Plaintiffs must allege that they were deprived of a right "secured by the Constitution and laws" of the United States and that this deprivation was committed under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 143 L. Ed. 2d 130, 119 S. Ct. 977 (1999). On appeal Plaintiffs contend that the district court erred when it concluded that the complaint failed to satisfy the color of state law requirement of § 1983. Plaintiffs argue that the involvement of the police in searching Moss and Yanaki's home and seizing their property pursuant to the Search and Enforcement Orders suffices to establish conduct committed under color of law.

To be under color of law, the deprivation of a federal right "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible" and "the party charged with the deprivation must be a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant

aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).[6] Applying this analytical framework in *Lugar*, the Court determined that the plaintiff's allegation that private conduct unlawful under state law deprived the plaintiff of his property without due process failed to state a claim under § 1983. *Id.* at 940.[7] The Court reasoned that the conduct "could not be ascribed to any governmental decision; rather [defendants] were acting contrary to the relevant policy articulated by the State." *Id.* The Court concluded that invocation of a state "statute without the grounds to do so could in no way be attributed to a state rule or a state decision." *Id.*

Similarly, this court has held that a private litigant's use of state court proceedings to obtain an *ex parte* temporary restraining order does not satisfy the color of law requirement of § 1983. *Torres v. First State Bank of Sierra County*, 588 F.2d 1322, 1325-27 (10th Cir. 1978). Consistent with the principles announced in *Lugar*, this court discussed the issue as follows:

> Is there state action simply because in litigation in a state court that court exercised its authority to issue an order which we assume to be wrong and which did not give the debtor his rights to procedural due process? In answering the question it is important to consider what this case is not. It is not a situation where an unconstitutional statute, regulation or custom is being enforced by the state courts. Nor is this a

> case where a private contract furthering discrimination or other unconstitutional conduct is being enforced by the courts. This does not involve a state officer using his authority, or the appearance thereof, outside the scope of his statutory duties.
>
> This is a case where private parties only were involved in state court litigation and it is alleged that the order granted by the court is not only erroneous but infringes one party's rights to procedural due process. . . .
>
> *We do not think that the "color of law" reference in* § 1983 *was intended to encompass a case such as this one, where the only infirmities are the excesses of the court order itself, subject to immediate modification by a court having jurisdiction over the parties, and subject to the normal processes of appeal.*

Id. (emphasis added) (citations omitted); *see also Lindley v. Amoco Prod. Co.*, 639 F.2d 671, 672-73 (10th Cir. 1981) (holding that a discovery order was not state action).

Yanaki and Moss do not challenge the constitutionality of the state laws under which the Search and Enforcement Orders were issued. Indeed, Plaintiffs assert that issuance of the Orders was unlawful under state law.[8] Without a challenge to the constitutionality of the state laws underlying the Search Order and accompanying Enforcement Order, the conduct of

which Plaintiffs complain cannot be attributed to a decision of the state because "[Defendants] were acting contrary to the relevant policy articulated by the State." *Lugar*, 457 U.S. at 940.[9] "To hold otherwise would open the door wide to every aggrieved litigant in a state court proceeding[], and set the federal courts up as an arbiter of the correctness of every state decision." *Bottone v. Lindsley*, 170 F.2d 705, 707 (10th Cir. 1948). Because Plaintiffs allege nothing more than "private misuse" of state laws, their complaint fails to satisfy the first part of the color of law test as announced in *Lugar*. *See* Lugar, 457 U.S. at 941.

Plaintiffs, however, argue that the involvement of the police in the search of Moss and Yanaki's residence makes this case factually distinguishable from the Supreme Court's decision in *Lugar*. Yanaki and Moss do not allege that Defendants conspired with the state court judge or with the police to obtain the Search Order or the Enforcement Order. *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 27-28, 66 L. Ed. 2d 185, 101 S. Ct. 183 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). Plaintiffs allege only that Defendants' search of the residence was conducted in concert with the police who were acting pursuant to the orders of the state court, which Plaintiffs admit were unlawful under state law. The involvement of the police in executing the court-ordered search, without more, does not convert Defendants' abuse of state law into conduct attributable to the state for purposes of § 1983 liability. *See Winterland Concessions Co. v. Trela*, 735 F.2d 257, 262 (6th Cir. 1984); *Taylor v. Gilmartin*, 686 F.2d 1346,

1348-49, 1355 n.3 (10th Cir. 1982); *Torres*, 588 F.2d at 1327.[10] Without a challenge to the constitutionality of the underlying state laws or any suggestion of a conspiracy between Defendants and the police, the actions of the police in discharging their official duties do not distinguish Plaintiffs' claims from the claim rejected in *Lugar*. *See Lugar*, 457 U.S. at 924 (noting that the writ of attachment was executed by the County Sheriff).[11] Thus, Plaintiffs fail to satisfy the first part of the color of law test because the conduct that Plaintiffs complain deprived them of their constitutional rights was caused by and can only be attributed to the private Defendants. It is therefore unnecessary to address whether the private Defendants "may fairly be said to be [] state actors." *Id.* at 937.

V. CONCLUSION

Because there is no set of facts under which Plaintiffs can establish that the alleged deprivation of rights was committed under color of state law, we conclude that Plaintiffs have failed to state a claim under 42 U.S.C. § 1983.[12] This court therefore AFFIRMS the district court's order dismissing Plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6).

Footnotes

n1 For purposes of an appeal from a Rule 12(b)(6) dismissal, we accept all well-pleaded factual allegations as true and view them in the light most favorable to the nonmoving party. *Sutton v. Utah Sch. for the Deaf &*

Blind, 173 F.3d 1226, 1236 (10th Cir. 1999).

n2 The state court did not specify which laws it was relying on when it issued the Search Order. In its memorandum in support of the *ex parte* motion, Iomed supplied three legal bases for issuance of the order: (1) the Utah Uniform Trade Secrets Act, codified as Utah Code Ann. §§ 13-24-1 to -9 , which Iomed asserted provides Utah courts with authority to protect trade secrets by any reasonable means; (2) Rule 34 of the Utah Rules of Civil Procedure, which states, in relevant part, that a party may serve a request on another party "to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)," Utah R. Civ. P. 34(a); and (3) the general authority of the court to compel compliance with its orders and to "control its process and orders to conform to law and justice," Utah Code Ann. § 78-7-5.

n3 Yanaki and Moss named the following as defendants: Iomed, Inc.; Robert Lollini (Chief Operating Officer of Iomed); Mary Crowther (Iomed employee); Laura Millar (executive assistant at Iomed); Parr, Waddoups, Brown, Gee & Loveless (Iomed's law firm); Clark Waddoups, Jonathan Hafen, and Justin Matkin (attorneys); Office Equipment Associates; Scott Johnson (owner and controller of Office Equipment Associates); and John Does I through XX (members of Iomed's Board of Directors and other unknown

conspirators) [hereinafter and collectively, "Defendants" unless otherwise specified]. It is not disputed that all of the Defendants are private persons or actors.

n4 Although the issue was not addressed by the district court, Plaintiffs do not have a viable Fifth Amendment claim because the Fifth Amendment only applies to federal action. *See Smith v. Kitchen*, 156 F.3d 1025, 1028 (10th Cir. 1997).

n5 Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

n6 In determining whether the plaintiff's claims satisfied the under color of law element of § 1983, the

Supreme Court noted that the two parts of the test converge when the claim is "directed against a party whose official character is such as to lend the weight of the State to his decisions." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).

n7 *Lugar* involved a debtor who had sued his creditor under § 1983, alleging that the creditor's prejudgment attachment of the debtor's property deprived the debtor of his property rights without due process of law. *Id.* at 924-25. Two counts of the plaintiff's complaint alleged violations of the Due Process Clause. *Id.* at 940. In Count One plaintiff challenged the state statutory scheme, under which defendant had obtained prejudgment attachment of plaintiff's property, as defective under the Fourteenth Amendment. Id. at 940-41. In Count Two plaintiff alleged a deprivation of property that resulted from defendant's "unlawful" conduct, by which plaintiff apparently meant unlawful under state law. *Id.* at 940.

n8 At oral argument Plaintiffs admitted that there is no allegation in the complaint that the state laws upon which the Search and Enforcement Orders were based are facially unconstitutional. Plaintiffs had said as much in their complaint and in their briefs. *See* Complaint P 182 (arguing that defendants avoided use of the constitutional Utah state laws and "misused the laws upon which they relied"); Aplt. Br. at 10 (recognizing that "long-established Utah law held that any state law purporting to authorize the procurement of civil search warrants by private parties in civil litigation is illegal as

in violation of the Utah Constitution"); *id.* at 14 n.5 ("The orders clearly do not constitute valid search warrants under Utah law."); *id.* at 16 n.6 (citing *Allen v. Trueman*, 100 Utah 36, 110 P.2d 355, 361 (Utah 1941), for the proposition that the Search Order was invalid under Utah law); Aplt. Reply Br. at 6 (arguing that Plaintiffs' claim is strengthened by the suggestion that "there was no legal basis for such an order").

n9 *See also Cobb v. Saturn Land Co.*, 966 F.2d 1334, 1335 (10th Cir. 1992) (noting that "action allegedly taken in violation, rather than under color, of state law, [] can serve as a basis only for Plaintiff's" state law claim); *Roudybush v. Zabel*, 813 F.2d 173, 177 (8th Cir. 1987) ("State policy is not implicated when an injured party claims that a private party has violated a constitutional post-judgment procedural statute in the course of depriving the injured party of his property. To the contrary, the state, by enacting the statute, has expressly condemned a deprivation by such means."); *Barnard v. Young*, 720 F.2d 1188, 1189 (10th Cir. 1983) ("To the extent that plaintiff alleges that state law did not authorize defendant to obtain [plaintiff's medical] records, 'the conduct of which [plaintiff] complained could not be ascribed to any governmental decision.'" (quoting *Lugar*, 457 U.S. at 940)); *Gilmore v. Salt Lake Cmty. Action Program*, 710 F.2d 632, 638 (10th Cir. 1983) (concluding that because the "alleged deprivations [did not] result[] from a governmental rule, policy, or decision," the conduct of the defendant, a state actor, was not state action).

n10 Plaintiffs' reliance on *Gallagher v. "Neil Young*

Freedom Concert," 49 F.3d 1442 (10th Cir. 1995), is misplaced. There was no suggestion in *Gallagher* that the allegedly unconstitutional pat-down searches at issue were conducted pursuant to a state court order that itself was unlawful under state law. *See* id. at 1445-46.

n11 The dissent focuses on the second part of the color of law test in *Lugar* and ignores the fact that Plaintiffs cannot satisfy the first part of the test because Defendants' conduct is not attributable to the state. *See Lugar*, 457 U.S. at 937, 940-41. The dissent contends that the facts of the present case are analogous to those of *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), in which the Ninth Circuit found the color of law requirements to be satisfied. In *Howerton*, however, the plaintiffs used the police to "put the weight of the state behind their private decision to evict," causing the case to fall within the "abuse of authority" doctrine of *Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961), and thus making it expressly distinguishable from *Lugar*. *Howerton*, 708 F.2d at 384 & n.9 (noting that "police were on the scene at each step of the eviction" and "actively intervened" at the request of the private defendants and on the initiative of one of the officers). Here, the police involvement was caused solely by the issuance of the state court order and not by the private Defendants seeking out the police officers in aid of their private agenda. There is no suggestion by the dissent that Plaintiffs alleged a conspiracy between the police and the private Defendants, only that the police "facilitated the allegedly illegal search and seizure." In this case, the

conduct of the police does not fall under the abuse of authority doctrine of *Monroe* because the police, in executing the court order, were merely discharging their statutory duties. *See Torres v. First State Bank of Sierra County,* 588 F.2d 1322, 1326 (10th Cir. 1978).

n12 Our disposition of Plaintiffs' appeal makes it unnecessary to address the alternative grounds for affirmance offered by Defendants.

DISSENT BY: HOLLOWAY

DISSENT: HOLLOWAY, Circuit Judge, dissenting.

I am convinced that the Plaintiffs Yanaki and Moss have sufficiently alleged state action with respect to Count I of their § 1983 claim. Therefore we must reverse the district court's grant of dismissal of Plaintiffs' § 1983 case under Fed. R. Civ. P. 12(b)(6). For the reasons discussed below, I thus respectfully dissent.

The Majority Opinion bases its affirmance of the dismissal on the following conclusions:

> Without a challenge to the constitutionality of the underlying state laws *or any suggestion of a conspiracy* between Defendants and the police, the actions of the police in discharging their official duties do not distinguish Plaintiff's claims from the claim rejected in [*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)].

> Thus, Plaintiffs' fail to satisfy the first part of the color of law test because the conduct that Plaintiffs' complain deprived them of their constitutional rights was caused by and can only be attributed to private defendants.

Maj. Op. at 11-12. (emphasis added). I can accept the Majority's conclusion that Plaintiffs have not challenged the constitutionality of the state laws upon which the magistrate relied in issuing the Search Order or the Supplemental Order in Aid of Enforcement.[1] Thus, even without a challenge to the constitutionality of state laws, I disagree with the Majority's conclusion that Plaintiffs failed to sufficiently allege concerted action between the private Defendants and the police in order to support a finding that the Defendants were acting "under color of state law."

Because we are called on here to review the district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), we must accept all well-pleaded factual allegations as true, and view them in the light most favorable to the non-moving party. *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

We are instructed firmly that a 12(b)(6) motion should not be granted "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. at 45-46. Our function on a R. 12(b)(6) motion is "not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's

complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton*, 173 F.3d at 1236; *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

The Supreme Court in *Lugar* identified a two part test for determining whether conduct allegedly causing the deprivation of a federal right may be fairly attributed to the state for the purposes of a § 1983 claim:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar v. Edmondson Oil Co., 457 U.S. at 937. In the instant case, Plaintiffs allege three counts by which they claim a deprivation of their rights "under color of state law" in violation of § 1983. App. at 36-42 (Yanaki); 153-58 (Moss). The first count deals with the search of Yanaki's home itself, and seizure of materials within it, conducted by Defendants in concert with Salt Lake County officers. App. at 36-38; 153-55. Plaintiffs argue that this search was unreasonable, based on an unlawful private warrant and without probable cause. *Id.* The second and third counts address Defendants' actions in obtaining the ex parte Search Order and Supplemental

Order, which Defendants claimed authorized their search. App. at 38-42; 155-58. Accepting the Majority's conclusion that the Plaintiffs fail to challenge the constitutionality of any state laws under which the Orders were issued, the second and third counts would therefore amount to allegations of no more than "private misuse of a state statute," which does not meet the first prong of the *Lugar* test. *See Lugar* at 941.

However, Count I of Plaintiffs' § 1983 complaint, which asserts multiple allegations about conduct during the *execution* of the search order does meet both prongs of the *Lugar* test and does sufficiently allege action "under color of state law" within the meaning of § 1983 so as to survive a motion to dismiss. The first prong of the *Lugar* test - that the deprivation of a right is attributable to the state - is satisfied when "the authority of state officials. . . put the weight of the State behind Defendant's private decision[.]" *Lugar* at 940. The Court in *Lugar* further instructs that the second prong, identification of a defendant as a state actor, may arise "because he is a state official, *because he has acted together with or has obtained significant aid from state officials*, or because his conduct is otherwise chargeable to the state." *Id.* at 937 (emphasis added).

In *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453-56 (10th Cir. 1995), we surveyed several instances in which courts have found action "under color of state law" where governmental and private parties have acted together (the so-called "joint action" test). We noted that "just as with the other tests for state

action, the mere acquiescence of a state official in the actions of a private party is not sufficient." *Id.* at 1453. One way of inferring a joint action claim is where "both public and private actors share a common, unconstitutional goal." *Id.*, at 1454. An alternative approach is "focused on the manner in which the alleged constitutional deprivation is effected." *Id.* The precedents hold that, "if there is a 'substantial degree of cooperative action' between state and private officials, or if there is 'overt and significant state participation' in carrying out the deprivation of the plaintiff's constitutional rights, tate action is present." *Id.* (internal citations omitted). Typically, the joint action test can be satisfied where police are involved in cooperative action with a private party when "the police have substantially assisted in the allegedly wrongful conduct." *Id.* at 1455.

An unreasonable search or seizure is clearly "wrongful" when conducted by a state official. Such a search or seizure violates the Fourth, Fifth and/or Fourteenth Amendments and may be the subject of a suit under § 1983. *See e.g. Burdeau v. McDowell*, 256 U.S. 465, 475, 65 L. Ed. 1048, 41 S. Ct. 574 (1921) ("The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action."); *Zinermon v. Burch*, 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990) ("[The Due Process] Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under § 1983 for state officials' violation of his rights to, e.g., freedom of speech or freedom from unreasonable searches and

seizures.") In the instant case, assuming that the search of Yanaki's and Moss's home on behalf of private party Defendants was unreasonable,[2] the search becomes a constitutional violation if police lend the imprimatur of the state to it by "substantially assisting" the private defendants in carrying it out, and the private defendants in turn become "state actors" if they exercise a "substantial degree of cooperative action" with police or if they "share a common, unconstitutional goal."

There are numerous allegations in the complaint which should fairly be read to demonstrate both significant assertion of authority by Deputy Sheriffs, which put the weight of the State behind the search of Plaintiffs' home, and substantial cooperative action between Defendants and the officers in conducting the search, which establish Defendants as state actors. The Complaint alleges that at approximately 8:00 a.m. on Monday morning, April 15, 2002, Defendant attorney Matkin *and Sheriff's Deputy Kopp* rang the doorbell of Yanaki's home three separate times, awakening Plaintiff Moss. App. at 7. After she refused them entry, Mr. Matkin, an Iomed attorney, said: "We can come in now, or we can come in later. *Id.* at 8. Deputy Sheriff Kopp, "*to support Matkin's statement and to intimidate Moss, said: 'we can kick in this door.'*" *Id.* (emphasis added). After leaving to obtain a writ of assistance from the state magistrate, the Majority Opinion notes that Defendant Matkin returned to Yanaki's home and that Matkin *and Officer Kopp* and others entered Yanaki's home and commenced the search. Maj. Op. at 4. "Shortly thereafter *a second police officer, Sergeant*

Kendra Herlin, arrived to assist." *Id.* (emphasis added). The Majority Opinion also states that the "*officers* seized Moss and Yanaki's computer and other material belonging to them." *Id.* (Emphasis added).

The above allegations are analogous to those considered by the Ninth Circuit in *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), a case which we cited approvingly in *Gallagher*. *Howerton* dealt with a landlord's private eviction of his tenants, executed with significant involvement and assistance from local police. There was no allegation of unconstitutionality regarding any underlying state law which would have allowed the eviction. Indeed, the tenants contended that the eviction in *Howerton* was illegal under state law. *See id.* at 381.[3] The court noted:

> This case involves more than a single incident of police consent to "stand by" in case of trouble. Police were on the scene at each step of the eviction. Mr. Gabica testified that the police presence gave him the feeling he had the right to cut off the utilities. Moreover, the police officer actively intervened--he privately approached the Howertons and recommended that they leave the trailerhouse.

Id. at 384. The court further reasoned as follows:

The Supreme Court in a 1983 action has affirmed a judgment against a private party where state agents seized the plaintiff's property, the agents acting pursuant to statute upon the private party's ex parte

application. *E.g., Fuentes v. Shevin,* 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). *See also Lugar*[,] [457 U.S. at 934]. On the other hand, a private repossession pursuant to a state statutory provision is not state action. *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 164-66, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978). In this case, the Howertons claim the Gabicas chose a middle road, using the police to facilitate an illegal repossession. If true, we think this constituted state action.

Id. The Ninth Circuit therefore reversed the district court's dismissal, holding that the facts as alleged were sufficient to support the conclusion that the landlord had acted "under color of state law."

As in *Howerton,* state officers in this case were on the scene throughout Defendant's search of Yanaki's and Moss's home and seizure of their property. They clearly facilitated the allegedly illegal search and seizure at Yanaki's and Moss's home in the same manner that the police facilitated the allegedly illegal repossession in *Howerton.* I therefore believe, as in *Howerton,* that the district court's dismissal of Yanaki's and Moss's Count I must be reversed.[1]

Accordingly, I respectfully dissent.

Footnotes

n1 I do not find that a clear concession was made that the Plaintiffs are not challenging the constitutionality of the Utah laws involved. For example *see* Aplt. Op. Br.

at 19 ("The state laws that served as the basis of the state judge's search and seizure orders, whatever those laws are, violate the Fourth Amendment's prohibition against unreasonable searches and seizures."). However, for purposes of my analysis, I need not decide whether such a concession was made. This is because, as I explain below, in any event I am persuaded that there are sufficient allegations in the Plaintiffs' complaints of concerted or conspiratorial conduct by Defendants with the state officers so that we cannot say that the Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Rather, those allegations detailed below clearly support an inference of concerted action between Defendants (including Iomed's lawyers) and Deputy Sheriffs.

n2 While Defendants maintain that the search and seizure executed were reasonable, see Aplee Br. at 23-25, the Supreme Court has recognized that a determination of reasonableness implicated factual elements. *See e.g. O'Connor v. Ortega*, 480 U.S. 709, 729, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (reversing and remanding summary judgment for determination of factual elements necessary to determine reasonableness.). Given the myriad factual allegations of unreasonableness in the instant Complaint, it would be inappropriate for us to make a determination of reasonableness at this stage.

n3 This is comparable to the instant case where Yanaki argues that the Search Order and Supplemental Order

in Aid of Enforcement were also contrary to state law. It might be argued that the actions of state officers in executing an illegal eviction or an illegal court order cannot be attributable to the state because the eviction or court order is contrary to state policy. In these cases, however, the officers *are* the state. The fact that officers may have been acting contrary to relevant state policy could shield their employer from liability under *Monell v. Department of Social Services*, 436 U.S. 658, 688-94, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) (holding that municipalities were "persons" liable under § 1983 for constitutional violations that resulted from official policy or informal "custom," but not on a respondeat superior basis for injuries caused solely by individual employees' actions). But that circumstance would not shield any private parties who directly and closely acted in concert with the officers in their unconstitutional conduct.

n4 The Majority Opinion in its footnote 11 attempts to escape the force of *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), by arguing that *Howerton* is distinguishable because the Plaintiffs there used the police to put the weight of the state behind their private decision to evict. The allegations here cannot be so parsed against the non-moving parties. They must be read instead under the Supreme Court's teaching in *Conley v. Gibson*, 355 U.S. at 45-46, to see whether some set of facts might be shown to entitle the non-moving parties to relief. And under *Lugar*, 457 U.S. at 941, private parties' (like Iomed's lawyers') "joint participation with state officials" (like Kopp and Herlin) was sufficient to characterize the private parties as

state actors for purposes of the Fourteenth Amendment.

The complaints of Yanaki and Moss must be read most favorably to those Plaintiffs to determine whether they averred circumstances under which a showing could be made that the Defendants "put the weight of the State behind their private decision . . ." *Lugar* at 940. We must note that in Yanaki's complaint he alleges:

> On April 15, 2002, Matkin, Crowther and Johnson [Defendants-Appellees] conducted an illegal search of Yanaki's home, jointly, under color of state law, with the Salt Lake County Sheriff's Office, and the search was a state action conducted pursuant to orders from a state court judge . . . on April 15, 2002, Matkin, Crowther and Johnson illegally seized property that belonged to Yanaki from his home jointly under color of state law, with the Salt Lake State Sheriff's Office and the seizure was a state action, conducted pursuant to orders from a state court judge . . . the search and seizure was unreasonable under the circumstances . . .

App. 136-137. Parallel allegations are made in the complaint of Moss. See App. at 153-154.

To me, these allegations are clearly adequate to permit a showing that the Sheriff's Deputies participated in conducting the search and removing property of Yanaki and Moss, and they demonstrate putting the weight of the state behind the search and seizure.

Case No. 2:03-CV-0345 (Consolidated Case No. 2:03-CV-0346)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JAMAL YANAKI and SUSAN I. MOSS,
Plaintiffs,

vs.

IOMED, INC., ROBERT J. LOLLINI, MARY CROWTHER, LAURA MILLAR, PARR WADDOUPS BROWN GEE & LOVELESS, CLARK WADDOUPS, JONATHAN O. HAFEN, JUSTIN P. MATKIN, OFFICE EQUIPMENT ASSOCIATES, SCOTT L. JOHNSON AND JOHN DOES I THROUGH XX,
Defendants.

March 11, 2004, Decided
March 11, 2004, Filed

COUNSEL: For JAMAL YANAKI, SUSAN I. MOSS, plaintiffs (03-CV-345): David W Scofield, Ronald F. Price, PETERS SCOFIELD PRICE, SALT LAKE CITY, UT.

For IOMED INC, ROBERT J. LOLLINI, MARY CROWTHER, LAURA MILLAR, PARR WADDOUPS BROWN GEE & LOVELESS, CLARK WADDOUPS, JONATHAN O. HAFEN, JUSTIN P. MATKIN, OFFICE EQUIPMENT ASSOCIATES dba

OfficeWare, SCOTT L. JOHNSON, defendants (03-CV-345): David M. Bennion, Lara A. Reymann, Michael L Larsen, PARSONS BEHLE & LATIMER, SALT LAKE CITY, UT.

JUDGES: Dee Benson, United States District Judge.

OPINIONBY: Dee Benson

OPINION:

AMENDED OPINION AND ORDER

Before the Court is Defendants' Motion to Dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure.* Having considered the parties' briefs, arguments and the relevant law, the Court issues the following Order.

FACTUAL BACKGROUND

This case has its origins in a dispute between Plaintiff Yanaki and Defendant Iomed, Inc. concerning Yanaki's alleged appropriation of confidential Iomed business information around the time he terminated his employment with Iomed, and the extent of Yanaki's compliance with the non-competition agreement that was part of his employment contract with Iomed. On April 9, 2002, Iomed filed a complaint in the Third District Court, Salt Lake County, State of Utah, against Yanaki and several other defendants, alleging a variety of harms, including misappropriation of trade secrets (Iomed Complaint P 52 *et seq.*), and violation of the non-competition term of his employment

agreement. (Iomed Complaint P 103 *et seq.*) The case was assigned to the Honorable Tyrone E. Medley.

On April 10, 2002, the day after the complaint was filed in the Third District Court, Iomed's laywers Clark Waddoups, Jonathan Hafen, and Justin Matkin, of defendant law firm Parr, Waddoups, Brown, Gee & Loveless, filed an Ex Parte Motion for Order to Conduct Immediate Discovery to Prevent the Destruction or Alteration of Evidence ("Search Order").[1] (Yanaki Complaint P 8.) On April 12, 2002, Waddoups and Hafen appeared before Judge Medley, who granted their ex parte motion for the Search Order.[2] (Yanaki Complaint PP 10, 19.) The Search Order authorized the Salt Lake County Sheriff's office, assisted by Iomed, to execute a search of Yanaki's residence, seize each hard drive found there, and recover any confidential Iomed files in Yanaki's possession. (Search Order P 3.) The Search Order required Iomed to file under seal with the Court the originals seized, and afforded Yanaki and his counsel the opportunity to review these materials before Iomed was to have further access to them. (Search Order PP 4-5.)

Salt Lake County Sheriff's Deputy Heinz Kopp and Defendant Matkin arrived at the home of Yanaki and Plaintiff Susan Moss at approximately 8:00 on the morning of April 15, 2002, a Monday, and served Moss with a copy of the Search Order.[3] (Complaint P 20.) Moss informed Kopp and Matkin that Yanaki was away from home and that she would not allow them into the home during his absence. Despite Matkin's assertion that "We can come in now, or we can come in later," and Deputy Kopp's comment to the effect that they could

kick the door down, Moss refused to allow them to execute the Search Order, and Matkin left to obtain a supplemental order. (Complaint P 22.)

Later on the morning of April 15, Matkin obtained from the judge, ex parte, a writ of assistance captioned "Supplemental Order in Aid of Enforcement," which authorized the use of "reasonable force" to execute the Search Order. (Complaint P 25; Writ of Assistance.) Matkin returned to Plaintiffs' home, and, accompanied by Deputy Kopp and Defendants Mary Crowther (an Iomed employee) and Scott L. Johnson (an employee of Defendant Office Equipment Associates), served the Writ of Assistance on Moss. (Complaint P 31; Memo ISO P11.) Moss allowed Kopp, Matkin, Crowther, and Johnson to enter her home, where they seized documents and copied Yanaki's computer's hard drive, zip disks, and a compact disk. (Memo ISO P 12.) The materials seized were deposited with the Third District Court. (Memo ISO P 13.)[4] On April 14, 2003, Plaintiffs Yanaki and Moss commenced the instant action by filing separate complaints.[5]

ANALYSIS

Plaintiffs allege a violation of their right to be free from unreasonable searches and seizures (Yanaki Complaint P 167 *et seq;* Moss Complaint P 167 *et seq.),* as well as deprivations of liberty and property rights without either procedural or substantive due process of law (Yanaki Complaint P 175 *et seq.;* Moss Complaint P 175 *et seq.).*[6] Because they allege these deprivations all occurred under color of state law, Plaintiffs claim a remedy pursuant to *42 U.S.C. § 1983.*

To state a cause of action under *section 1983*:

> First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show the defendant acted "under color of law."

Adickes v. S. H. Kress & Co., 398 U.S. 144, 150, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). Because the deprivations of which Plaintiffs complain will not give rise to a cause of action under *§ 1983* if there was no action taken under color of state law, it may be expedient to analyze the second part of the test first.[7] *See Gilmore v. Salt Lake Community Action Program, 710 F.2d 632, 637 (10th Cir.1983).*

In order to satisfy the requirement that the deprivation occur under color of state law, the conduct of which a plaintiff complains must be fairly attributable to the State. The United States Supreme Court has identified two aspects to the determination of fair attribution:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible ... Second, the party charged with

> the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar v. Edmondson Oil Company, Inc., 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). Plaintiffs allege that Defendants' use of state discovery rules to obtain an order from a state court judge permitting the search of their home and the seizure of Yanaki's property satisfies the first part of the test for fair attribution. (Plaintiffs' Consolidated Supplemental Memorandum Re: State Action at 10 *et seq.*) Plaintiff is in error. For the purposes of actions under *§ 1983*, *Lugar* clearly distinguishes between court orders purportedly authorized by unconstitutional statutes and unconstitutional orders purportedly authorized by constitutional statutes. The inappropriate use by private litigants of a constitutional statute or rule does not constitute state action for the purposes of *§ 1983*. *See Lugar 457 U.S. at 940.* ("That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision ... a private misuse of a state statute does not describe conduct that can be attributed to the State.")[8] Under the reasoning articulated in *Lugar*, passing an unconstitutional statute in a state legislature and enforcing it in state courts is action fairly attributable to the state, and can subject private litigants who make use of the statute to liability under *§ 1983*. *See id. at 940-942* (private litigant subject to liability under *§*

1983 for obtaining an *ex parte* order under a state statute subsequently found unconstitutional). The Plaintiffs before this Court have not argued that the Search Order in question was issued pursuant to a constitutionally infirm statute, but rather that the Search Order itself was unconstitutional.

Courts have been extremely reluctant to extend liability under *§ 1983* to private litigants making use of the constitutionally valid tools provided them by state law:

> We do not think that the "color of law" reference in *§ 1983* was intended to encompass a case such as this one, where the only infirmities are the excess of the court order itself, subject to immediate modification by a court having jurisdiction over the parties, and subject to the normal processes of appeal.

Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1326-7 (10th Cir. 1978). See also Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983) ("To the extent that plaintiff alleges that state law did not authorize defendant to obtain the records [pursuant to state court order] 'the conduct of which [plaintiff] complained could not be ascribed to any governmental decision.'") (quoting *Lugar, 457 U.S. at 940*); *Lindley v. Amoco Production Co., 639 F.2d 671 (10th Cir. 1981)* (citing *Torres* as authority for finding no state action, and thus no cause of action under *§ 1983*, when a court order made pursuant to state discovery rule authorized plaintiff in a civil case to enter defendant's home and seal files located there).

Restricting the availability of *§ 1983* actions to cases in which there is action fairly attributable to the state provides a principle limiting the variety and number of state court proceedings capable of creating federal causes of action. While not absolutely eliminating the possibility that state court proceedings could form the basis of *§ 1983* actions in federal court, the Tenth Circuit Court of Appeals has limited *§ 1983* actions to those exceptional cases in which the state court proceedings may be characterized as a complete nullity, thus preserving the gate-keeping function served by the requirement of state action:

> To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings [sic], and set the federal courts up as an arbiter of the correctness of every state decision ... [The *Fourth Amendment* does not] "assure uniformity of decisions or immunity from merely erroneous action."

Bottone v. Lindsley, 170 F.2d 705, 707 (10th Cir. 1948) (quoting *Snowden v. Hughes, 321 U.S. 1, 15, 88 L. Ed. 497, 64 S. Ct. 397 (1944)* (Frankfurter, J., concurring)).

Because neither the pleadings nor the facts of the case before the Court support an argument that the statute under which the state judge issued the Search Order was unconstitutional or that the state court proceedings of which the Search Order is a part were a complete nullity, Plaintiffs have failed to plead the element of state action requisite to sustain an action under *§ 1983*. With respect to their claims made under federal law, Plaintiffs have therefore failed to state a

claim upon which relief can be granted, and dismissal pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* is appropriate.

Because this order disposes of all Plaintiffs' claims involving federal law, pursuant to *28 U.S.C. § 1367(c)(3)* the Court declines to exercise its supplemental jurisdiction over Plaintiffs' remaining state law claims.

CONCLUSION

For the preceding reasons, the Court GRANTS Defendants' 12(b)(6) Motion to Dismiss with prejudice.

IT IS SO ORDERED.

DATED this 11th day of March, 2004.

Dee Benson

United States District Judge

Footnotes

n1 The Motion was supported by affidavits given by Defendants Laura Millar, an Iomed executive assistant, and Robert J. Lollini, Iomed's Chief Financial Officer and Chief Operating Officer. (Memo. ISO Motion P 3.) Plaintiff alleges that the affidavits are perjurious. (Yanaki Complaint P 42 *et seq.*)

n2 The Search Order does not identify the statutory authority on which it is based. Iomed's Memorandum in Support of its Motion, however, identifies three statutory bases it suggests authorize the granting of such an order in a civil suit. Iomed argues that Rule 34 of the Utah Rules of Civil Procedure gives the Court

authority to issue an order for the production of documents, and for entry upon land in pursuit of documentary production as well. (Memo. ISO Motion at 10.) The pertinent portions of Rule 34 provide that

> Any party may serve on another party a request ... (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents ... within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

Utah R.Civ.P. 34(a). Iomed also invokes the court's general power to control its own processes in the interests of justice, a power codified in *Utah Code Ann. § 78-7-5* and the *Utah Constitution Art. VIII. § 5.* (Memo. ISO Motion at 10.) The Memorandum in Support appears to cite the entire *Utah Uniform Trade Secrets Act* as a statutory basis for the Search Order as well. (Memo ISO at 4.)

The Complaint alleges that the statutes on which the Search Order relies are constitutionally infirm for failing to provide for notice and a hearing. (Yanaki Complaint P 38.) This allegation is insufficient to ground a federal claim for several reasons. The Complaint purports to establish the statutory authority

on which the Search Order is based by quoting the Iomed Memorandum in Support of the Motion for the Search Order, rather than the Search Order itself. While the Search Order does not articulate the legal basis authorizing the state court's ruling, it may not necessarily be assumed that the court adopted Iomed's justification uncritically.

Even if the state court did rely on the statutory and constitutional provisions listed by Iomed in the Memorandum in Support of its Motion, however, Plaintiff's allegations remain insufficient. The procedure outlined in Utah Rule of Civil Procedure 34 *does* provide for service and response, satisfying constitutional requirements for notice and a hearing. *Article VIII § 5 of the Utah Constitution* and *Utah Code Ann. § 78-7-5*, on which Iomed also relied in its Memorandum, speak in general terms to the authority of courts to control their processes, and would not, by their nature, be expected to contain provisions providing for notice and a hearing. It is true that the Utah Uniform Trade Secrets Act does not speak explicitly to opportunities for notice and a hearing regarding discovery matters, but neither does the Act authorize the particular variety of discovery process of which Plaintiff complains.

The fact that the statutes and constitutional provisions Iomed identified in its Memorandum do not provide any authority for the particular type of Search Order obtained in this case is central to Plaintiffs' failure to state a claim on which relief can be granted. These statutes, even if they were relied upon by the state court, do not authorize the state court to issue an ex parte search order of the sort granted here. Even if the provisions on which Iomed relied were of a sort that

would be expected to contain notice and hearing provisions or risk unconstitutionality, Plaintiffs would still have failed to state a claim because those statutes did not authorize the Search Order. The Plaintiff in *Lugar v. Edmondson Oil Company, Inc.* had a *§ 1983* claim because the statute on which the trial court relied explicitly provided for the procedure of which that Plaintiff complained, and that procedure was unconstitutional. *457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).* Because the statutes and constitutional provisions cited in the Iomed Memorandum and the Complaint do not, explicitly or implicitly, provide the state court with the authority to issue the Search Order, the constitutionality of these provisions is irrelevant and cannot establish a claim under *§ 1983.*

n3 Yanaki was in Colorado at the time the Search Order was served and the search executed. (Complaint P 20.) Moss was also served with a summons, a copy of the Search Motion, and the Iomed Memorandum in Support of the Search Motion. (*Id.*)

n4 Yanaki's Complaint and Defendants' Memorandum in Support of the Motion to Dismiss offer differing accounts of the circumstances under which the materials seized were placed in the custody of the Third District Court. (Complaint PP 37-39; Memorandum ISO PP 12-13.) This dispute is not pertinent to the resolution of the legal issues before the Court.

n5 Plaintiffs stipulated to Defendants' Motion to Consolidate the cases filed separately by Moss and Yanaki; the cases were consolidated by order on May 9th, 2003.

n6 Yanaki also asserts state law claims for invasion of privacy (Yanaki Complaint P 187 *et seq.*); intentional infliction of emotional distress (Yanaki Complaint P 194 *et seq.*); trespass (Yanaki Complaint P 202 *et seq.*); conversion (Yanaki Complaint P 209 *et seq.*); and civil conspiracy (Yanaki Complaint P 216 *et seq.*). The Court's disposition of Plaintiffs' claims under federal law eliminates any need for discussion of these claims.

n7 With respect to the first element of proof, that Defendant deprived Plaintiff of a right secured by the "Constitution and Laws" of the United States, this case focuses primarily on the *Fourth Amendment* guarantee that "the people shall be free from unreasonable searches and seizures." Because of the Court's holding in this case that there is a failure to show that Defendants acted under color of law, there is no need to address in detail this aspect of Plaintiff's arguments. Indeed, given that the *Fourth Amendment* is only directed at unreasonable searches and seizures by state actors, and not private parties, if the second element of proof ("under color of law") is not met, it would be impossible to meet the first element in any event. Nonetheless, it appears clear that the conduct complained of in this case would be in violation of the *Fourth Amendment* if state action were involved. The invasion of Plaintiff's home, supported only by an ex parte submission of Plaintiffs' opponents in a civil lawsuit, appears to be precisely the type of unreasonable intrusion into a private dwelling that the *Fourth Amendment* is designed to prevent. Defendants' protestations to the contrary, an ex parte motion presented to a judge in the course of civil litigation is not the equivalent of a probable cause search warrant affidavit submitted by an independent

law enforcement officer. If there was a sufficient basis for finding that Defendants' actions in this case were committed under color of state law, this Court would find that Plaintiffs were deprived of a right secured by the "Constitution and Laws" of the United States.

n8 It may seem at first blush that state action is apparent when the basis for the behavior in question is an order of a state court, but the decisions of the Supreme Court and the Tenth Circuit Court of Appeal cited in this opinion make clear that the mere involvement of a state court or state law enforcement officer in a private matter does not necessarily constitute state action within the meaning of *§ 1983*. The focus of *§ 1983* is action *by* the state, not action initiated by private citizens, even those which peripherally involve the state. An assault and battery committed by a private citizen on a public sidewalk does not involve state action for *§ 1983* purposes. Nor does a private act committed by a private citizen in a state court lawsuit constitute state action, even if the act results in a court order that infringes upon another private citizen's rights. This distinction explains Lugar's finding of state action where the Plaintiff's challenge was directed at the actions of the Virginia state legislature in passing an unconstitutional statute. But the *Lugar* court was careful to point out that there would have been no case under *§ 1983* if the Plaintiff had alleged that his rights had been violated by an improper court order that was based on a constitutional state statute: "While the private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action." *Lugar 457 U.S. at 941*. The focus of *§ 1983* is not directed at

private parties such as the Defendants in this case, who are alleged to have misrepresented facts and otherwise acted inappropriately in obtaining an improper order from a state trial judge. As noted in footnote seven, above, the behavior of the Defendants may have been inadvisable and abusive of Plaintiffs' rights, and may or may not give rise to other legal causes of action, such as perhaps abuse of process, but the Defendants' actions were undisputedly *not* initiated by the state, and therefore pursuant to the precedent referred to in the body of this opinion may not serve as a basis for a claim under *§ 1983.*

No. 04-4061

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMAL YANAKI; SUSAN I. MOSS,
Plaintiffs-Appellants,

v.

IOMED, INC., a publically-held Utah corporation; ROBERT J. LOLLINI; MARY CROWTHER; LAURA MILLAR; PARR, WADDOUPS, BROWN, GEE & LOVELESS, a Utah professional corporation; CLARK WADDOUPS; JONATHAN O. HAFEN; JUSTIN P. MATKIN; OFFICE EQUIPMENT ASSOCIATES, a closely-held Utah corporation, doing business as OfficeWare; and SCOTT L. JOHNSON,
Defendants-Appellees.

Filed 1/28/2005

ORDER

JUDGES: Before BRISCOE, HOLLOWAY, and MURPHY, Circuit Judges

Appellant filed a petition for rehearing and rehearing en banc.

Appellant's petition for rehearing is DENIED. Judges Briscoe and Murphy voted to deny the petition; Judge Holloway voted to grant the petition.

Appellant's petition for hearing en banc is also

DENIED. A poll of the active judges of the court was taken. Judges Henry and Hartz voted to grant the petition for rehearing en banc.

Entered for the Court Clerk of Court

Douglas E. Cressler Chief Deputy Clerk

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7. On April 9, 2002, a complaint was filed in the Third District Court, Salt Lake County, State of Utah in a case captioned Iomed, Inc. v. Jamal Yanaki, Activatek, L.L.C., Ceramatec, Inc., Ashok Joshi and John Does I-X, Defendants. The complaint was assigned case number 020903031 and was assigned to the Honorable Tyron E. Medley, Third District Court Judge. A genuine copy of that Complaint is attached hereto as Exhibit A.

8. The following day, on April 10, 2002, and its lawyers, defendant Parr, Waddoups, Brown, Gee & Loveless, P. C. ("Law Firm"), Clark Waddoups ("Waddoups"), Jonathan O. Hafen ("Hafen") and Justin P. Matkin ("Matkin")
(collectively the "Lawyer Defendants") caused to be filed an Ex Parte Motion for Order to Conduct Immediate Discovery to Prevent the Destruction or Alteration of Evidence ("Search Motion"), a memorandum in support of that motion ("Iomed Mem.") and the affidavits of defendant Laura Millar ("Millar") and defendant Robert J. Lollini ("Lollini") (affidavits referenced as "Millar Affidavit" and "Lollini Affidavit"). A genuine copy of the Search Motion is attached hereto as Exhibit B. A genuine copy of the Iomed Mem. is attached hereto as Exhibit C. A genuine copy of the MillarAffidavit is attached hereto as Exhibit D. A genuine copy of the Lollini Affidavit is attached hereto as Exhibit E.

9. The Search Motion sought relief solely on the part of a private party in civil litigation. The Search Motion was not filed for the benefit or in furtherance of the desires of law enforcement pertaining to any criminal action or investigation or of any governmental agency to investigate civil violations of any

governmental regulatory scheme or to pursue any civil forfeiture action of any governmental agency or otherwise to further any interest of any governmental agency of any kind or nature, but solely and strictly for the benefit of an individual citizen.

10. Two days later, on April 12, 2002, Waddoups and Hafen appeared before the Honorable Tyrone E. Medley, Third District Court Judge, ex parte and without notice to Yanaki or Moss, to argue the Search Motion.

11. The Search Motion specifically requested that the court issue an order: Directing the Salt Lake County Sheriff's office, or other appropriate law enforcement agency as specified by the Court, with the assistance of Iomed, to execute this order at the residence and home address of Defendant Jarnal Yanaki, 385 North Wall Street, Salt Lake City, Utah 84103, or such other addresses as Yanaki may indicate, and to do the following:

> (a) take custody of each of the hard drives in one or more computers, of other electronic storage media, including specifically but not limited to ZIP drives and CD ROMS, and of the electronic day planner (a Palm Pilot) in the possession, custody or control of Defendant Jarnal Yanaki (all of the above are herein after [sic] defined as the "Yanaki Electronic Files") at the above address or addresses;
>
> (b) supervise the copying of information from the Yanaki Electronic Files by the computer expert provided by corned and to return such copy to Yanaki;
>
> (c) file the original Yanaki Electronic Files under seal with the Court until they can be reviewed for privilege by Yanaki's counsel and

analyzed by computer experts for content and evidence of deleted files; and

(d) recover any Iomed confidential files in Yanaki's possession, custody or control, including but not limited to files relating to Ceramatec and Aequitas, and to file those documents under seal with the Court. Search Motion, at Par. 2.

12. In the Iomed Mem., Iomed proffered the following justification for its motion: "This immediate and expedited discovery order is necessary to preserve evidence and avoid destruction or alteration of evidence to this case." Iomed Mem., at 2. Iomed then represented to Judge Medley: "The relief sought by this motion is necessary to preserve the evidence and avoid questions about the further destruction or alteration of documents important to this case." Id. at 3. Iomed then represented to Judge Medley: "Taking possession of and preservation of Iomed's confidential files is essential to stop continued damaging disclosure of Iomed's trade secrets and other proprietary business information." Id. at 3.

13. Iomed specifically invoked, as legal grounds for the order it sought: "The Uniform Trade Secrets Act codified at UTAH CODE ANN. § § 13-24, et seq. [,]" Id. at 4, and "U. R. Civil P. 4 [,]" Iomed Mem. at 10. loured also invoked the provisions of "UTAH CODE ANN. § 78-7-5 and Utah Constitution Art. VIII § 5." Mem. at 10.

14. None of the proffered legal bases for the relief sought incorporate, or even pretend to incorporate, prescribed statutory or administrative standards, that, themselves, are reasonable in their careful balancing of governmental and private interests before an order may issue thereunder authorizing a search of person's

home or seizure of their property.

15. Nor do any of those proffered legal bases mandate a right to a prior hearing before any search, contain any standards for determining reasonableness or even require, as a prerequisite to the relief sought, that a prior request for materials be made and refused, before invading a private citizen's home. Nor do they provide any prior opportunity to be heard before seizure or even any post-seizure right to hearing.

16. Iomed has conceded that its proposed search of Moss' Home implicated rights guaranteed to her under the Fourth Amendment to the United States Constitution, by arguing in the memorandum that the proposed search would not violate the Fourth Amendment. See Iomed Mem. at 8-9.

17. Iomed has conceded that Moss' rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution were implicated by the order sought by. See id. at 6-8.

18. In the course of attempting to convince Judge Medley that the rights guaranteed to Moss under the United States Constitution and the Utah Constitution were not being trampled by the entry of the order proposed by , the Lawyer Defendants, Lollini and Millar made certain misrepresentations of material fact, or omitted to set forth material facts necessary to the resolution of those issues, as set forth with specificity in Part II, below.

19. Judge Medley granted 's motion at that ex parte hearing based on the evidence and arguments presented to him, and the omissions and misrepresentations of, Lollini, Millar and the Lawyer Defendants, and executed a form of Order to the "Salt Lake County Sheriff's Office or other appropriate law enforcement agency as specified by the Court,"

directing it, inter alia, to conduct a search and seizure "with the assistance of Iomed to conduct a search and seizure with the assistance of Imoed," of Moss' Home, "to prevent further potential for alteration or destruction of evidence" ("Search Order"). A genuine copy of the Search Order is attached hereto as Exhibit F.

20. At approximately 8:00 a.m. on Monday morning, April 15, 2002, Matkin and Salt Lake County Sheriff's Deputy, Heinz Kopp ("Kopp"), rang the doorbell of the Home three separate tires, awakening Moss. Yanaki was then in the state of Colorado. Moss, still in her pajamas, looked through the small window in the front door and saw a police officer, whom she did not then know was Kopp, with another man, whom she did not then know was Matkin. Only because of the police officer's presence, Moss answered the door to her Home and was served with a summons, complaint, copy of the Search Motion, the Mem. and the Search Order.

21. After reading portions of the Search Order and seeing that is was directed to Yanaki, Moss advised Matkin and Kopp that Yanaki was not Home and she would not allow them in her Home without Yanaki being present.

22. Matkin then said "We can come in now, or we can come in later." Kopp, to support Matkin's statement and to intimidate Moss, said: "We can kick in this door," and Matkin advised Moss that he was going to get an additional order to allow them to do so.

23. Matkin then left while Kopp remained, surveilling the Home and thereby intimidating Moss.

24. On information and belief, Matkin then, on behalf of and in furtherance of Kopp's threat to kick down the door to gain entrance to Moss and Yanaki's Home, made a second, ex parte, approach to Judge Medley the

morning of April 15, 2002, requesting some form of writ of assistance for the illegal Search Order. Neither the state court docket nor state court file reflect what Judge Medley was told by Matkin when he sought that writ.

25. Nevertheless, Matkin obtained the relief he sought on Iomed's behalf, and procured Judge Medley's signature on a writ of assistance, captioned: "Supplemental Order in Aid of Enforcement" (hereinafter "Writ of Assistance") and dated and entered by the Court on April 15, 2002. A genuine copy of the Writ of Assistance is attached hereto a Exhibit G.

26. The Writ of Assistance expressly directed the Salt Lake County Sheriff's Office first, "to enter the residence and home address of Defendant Jamal Yanaki, 385 North Wall Street, Salt Lake City, Utah 84103" and, then, "use reasonable force, if necessry and appropriate under the circumstances, to execute the Order [Allowing Immediate Discovery to Prevent the Destruction or Alteration of Evidence], including entering through unlocked doors, conducting a search of the premises, and detaining any person who resists enforcement of the Order."

27. As was the case with the Search Order, the Writ of Assistance was obtained not at the request of any law enforcement agency or other governmental agency, but instead solely at the request of a private party in civil litigation.

28. The Writ of Assistance was not obtained for the benefit or in furtherance of the desires of law enforcement pertaining to any criminal action or investigation or of any governmental agency to investigate civil violations of any governmental regulatory scheme or to pursue any civil forfeiture

action of any governmental agency or otherwise to further any interest of any governmental agency of any kind or nature, but solely and strictly for the benefit of an individual citizen.

29. Because there is no record currently available to plaintiff showing the grounds presented to Judge Medley to obtain the Writ of Assistance, plaintiff infers the same bases were proffered as for the Search Order, which do not incorporate any prescribed statutory or administrative standards, that, themselves, are reasonable in their careful balancing of governmental and private interests before an order may issue thereunder authorizing a search of a person's home, by use of force, seizure of their property, or arrest of the person of anyone interfering with the foregoing activities.

30. Nor did any proffered legal basis for the Writ of Assistance mandate a right to a prior hearing before any search, contain any standards for determining reasonableness or even require, as a prerequisite to the relief sought, that prior request for materials be made and refused, before invading a private citizen's home or arresting any citizen. Nor did any proffered legal basis for the Writ of Assistance provide any prior opportunity to be heard before a seizure or even any post-seizure right to hearing.

31. Matkin returned to Moss' Home with the Writ of Assistance, and Matkin, Kopp, Crowther and defendant Scott L. Johnson ("Johnson"), who, on information and belief, owns and controls defendant Office Equipment Associates, a closely-held Utah corporation dba OfficeWare ("OfficeWare") all, in a deliberate show of force, came to the door of Moss' Home while the Writ of Assistance was served on Moss.

32. Moss, under threat of having the door to her

Home kicked in and under threat of arrest, had no voluntary alternative and stepped aside as Matkin, Kopp, Crowther and Johnson entered her Home and commenced the search and seizure.

33. Shortly thereafter, another Salt Lake County Sheriffs Deputy, Sergeant Kendra L. Herlin, also arrived to reinforce the threat to arrest Moss if she did not cooperate under the Writ of Assistance with the Search Order.

34. The United States Court of Appeals for the Tenth Circuit, in Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987) has stated that a writ of assistance is not the equivalent of a search warrant for Fourth Amendment purposes. Id. at 1525 ("Even though Jacobs told Owens that the writ of assistance was equivalent to a warrant, the writ on its face was not a search warrant.")

35. Kopp, pursuant to the Search Order and Writ of Assistance, and without the presence of Yanaki, executed and allowed Matkin, Crowther and Johnson to search Moss' Home, while preventing Moss from interfering under the Writ of Assistance's threat of arrest.

36. When advised by Matkin that he, Crowther and Johnson had determined what they wanted to seize, Kopp executed the Search Order and allowed the seizure of Moss and Yanaki's computer, containing private and confidential financial information and other materials belonging both to Moss and Yanaki, the seizure of Yanaki's written University of Utah Executive MBA Program materials, the seizure of papers and effect from the boxes that had been packed when Yanaki left and that had remained unpacked since that time, and the seizure of a CD-ROM belonging to, and clearly marked as the property of, Ceramatec,

Inc., a client of Yanaki's consulting business, which CD contained confidential information belonging to Ceramatec.

37. The property of Yanaki and Moss was then taken, without the consent of either, to, on information and belief, Johnson's place of business, OfficeWare.

38. Johnson handled the computer, including without limitation the hard drive, purporting to copy it without Moss or Yanaki's knowledge, consent or oversight, and purported to copy zip disks found in the unpacked boxes, as well as the CD-ROM that belonged to Ceramatec, Inc., all without Moss and Yanaki's consent, approval of method or oversight.

39. The Lawyer Defendants then caused what they purported to be the unaltered original seized property to be delivered to the Third District Court and Kopp prepared and the Lawyer Defendants caused to be filed a return on the Writ of Assistance, asserting that the execution of the Writ of Assistance had occurred on April 16, 2002, when in truth and in fact, the search and seizure occurred on April 15, 2002, entirely while Yanaki was out of Salt Lake City, Utah. A genuine copy of the return is attached as Exhibit H.

40. The Lawyer Defendants each had a role in the drafting and/or submission of papers to Judge Medley, intending him to rely upon those papers in making his decision to execute the Search Order and the Writ of Assistance.

42. The papers drafted and submitted by the Lawyer Defendants and the affidavits of Lollini and Millar contained materially false and misleading information, and omitted to set forth material, truthful information necessary to make other information not misleading to Judge Medley.

43. The Lawyer Defendants, Lollini and Millar each

agreed to participate in a conspiracy to commit fraud upon the Court, to induce Judge Medley to execute the Search order, by providing him with such false and misleading statements, and by omitting to provide material, truthful statements to him that were necessary to make other statements not misleading.

***

46. At least one object of the conspiracy was to procure a search order and to search Yanaki's (and Moss') Home and seize their property. At least one of several motivations that Iomed had to procure such an order for search and seizure was to send a message to its remaining employees, whom it was then demanding sign non-competition agreements, of the consequences of leaving without signing new agreements, i.e. "We'll break into your home just like we did to Yanaki if you don't sign." The fact of the search and seizure at Yanaki and Moss' Home was deliberately, and widely, disseminated at Iomed, after the fact. Comments made by Iomed officers after the illegal search and seizure included: "We got him!"; "Jamal is going to lose a few nights of sleep."; and "defending against Iomed's lawsuit will force Jamal into bankruptcy so he cannot compete." This is one reason why, on information and belief, the search and seizure idea was presented to and approved by one or more of the members of Iomed's Board of Directors, who also agreed to participate in and join the conspiracy, and who in fact took overt acts in furtherance thereof, but whose identity is currently unknown. The members of Iomed's Board of Directors, and other conspirators, are pleaded for purposes of this complaint as John Does I through XX. Plaintiff will seek leave to amend and add these parties as their true identities and conspiratorial participation and agreement are discovered.

***

135. The Lawyer Defendants falsely represented to Judge Medley that constitutional safeguards would be observed to preserve Yanaki's rights: "Iomed anticipates that the copy can be made at the location of the computer expert or at Yanaki's location if he so requests. Only if Yanaki refuses to immediately turn over these items, will the Order require a search of Yanaki's personal residence." Iomed Mem. at 8.

136. The Lawyer Defendant omitted to point out to Judge Medley that the Search Order they submitted and had Judge Medley sign did not in fact proscribe a search without those requisites being met.

137. In truth and in fact, when the Search Order was served, Yanaki was not even in the state of Utah, so he could not be given the choice the Lawyer Defendants themselves represented to Judge Medley would be mandatory.

138. Nor, when the illegal search was conducted, was Moss even given the option of producing requested items prior to an entry into and search of her Home. Instead, she was told only that, if she did not provide entry for a search, her door would be broken in, despite her protests that Yanaki was not present.

***

143. In truth and in fact, the search authorized by the Writ of Assistance was completely unlimited, and was directed to the entire premises, not just Yanaki's home office.

144. In truth and in fact, the search that was conducted led to the illegal seizure of files, effects and information that do not belong to, and that belong to Moss, Yanaki and Ceramatec.

***

153. The Lawyer Defendants also misrepresented to

Judge Medley that "the order sought by Iomed would grant Yanaki every procedural protection- Yanaki has a right to a prompt post-seizure hearing, and the right to seek damages or compensation for any wrongful taking." Iomed Mem. at 7.

154. The Lawyer Defendant omitted to point out to Judge Medley that the Search Order they submitted and had him sign did not in fact contain any procedure for a prompt post-seizure hearing.

155. Nor did any rule, legislative enactment or administrative scheme exist, pursuant to which the Search Order was obtained, that allowed a prompt post-seizure hearing or constituted any legislative or administrative determination of reasonableness for any search.

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161. The Search Order and Writ of Assistance were sought pursuant to "The Uniform Trade Secrets Act codified at UTAH CODE ANN. § § 13-24, of seq. [,]" Id. at 4, and "U. R. Civil P. 34 [,]" Iomed Mem. at 10. Iomed also invoked the provisions of "UTAH CODE ANN. § 78-7-5 and Utah Constitution Art. VIII § 5." Iomed Mem. at 10. The Search Order and Writ of Assistance were therefore sought, and obtained under color of state law,

162. The Search Order and Writ of Assistance were served by the Salt Lake County Sheriffs Department and, therefore, the search of Moss and Yanaki's Home and seizure of their and Ceramatec's property was conducted under color of state law.

163. Moss has privacy rights in her person, house, papers and effects, property rights in her house, papers and effects and liberty rights in her peaceful occupation of her Home, possession of her property and ability to have personal and business relationships uninterrupted

by governmental intrusion, without due process of law.

164. The United States Constitution guarantees Moss certain rights, as follows:

a. Moss shall not "be deprived of life, liberty, or property, without due process of law. . . " U.S. Const., amend. V.

b. Moss has the inviolate right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .." U.S. Const., amend. IV. A search and seizure in the absence of a validly-issued search warrant is presumptively invalid.

c. Moss' rights are made applicable to the government of the state of Utah; "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV.

165. Moss' constitutional rights have been violated by the issuance of the Search Order and Writ of Assistance and search and seizure pursuant thereto, under color of state law, in violation of 42 U.S.C. § 1988. Each of the defendants participated in the violation of Moss and Yanaki's civil rights.

COUNT I

(VIOLATION OF MOSS' CIVIL RIGHTS-UNREASONABLE SEARCH AND SEIZURE, UNDER COLOR OF STATE Law 42 U.S.C. § 1983; AND ATTORNEYS' FEES, 42 U.S.C. § 1988)

168. Moss incorporates paragraphs 1 through 165,

above.

167. On April 15, 2002, Matkin, Crowther and Johnson conducted an illegal search of Moss' Home, jointly, under color of state law, with the Salt Lake County Sheriff Office, and the search was a state action, conducted pursuant to orders from a state court judge.

168. On April 15, 2002, Matkin, Crowther and Johnson illegally seized property that belonged to Moss from her Home, jointly, under color of state law, with the Salt Lake County Sheriffs Office, and the seizure was a state action, conducted pursuant to orders from a state court judge.

169. The search end seizure were not undertaken pursuant to a search warrant, properly issued by a neutral magistrate, who had been advised of all material facts. The Fourth Amendment to the United States Constitution prohibits the issuance of search warrants merely upon the conclusory allegations of a private party.

170. No exception to the warrant requirement of the Fourth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment to the United States Constitution existed.

171. The search and seizure were unreasonable under the circumstances, and the acts of each of the defendants described above deprived Moss of the right to be secure in her person, house, papers, and effects against unreasonable searches and seizures as guaranteed to her under the Fourth Amendment to the United States Constitution and of her right not to be deprived of liberty or property without due process of law as guaranteed to her under the Fourteenth Amendment to the United States Constitution.

***

181. On April 10, 2002, the Lawyer Defendants

procured the Search Order, authorizing the search of Moss' Home and seizure of her property, without prior notice to her or Yanaki, without any opportunity to be heard and pursuant to "The Uniform Trade Secrets Act codified at UTAH CODE ANN. § § 13-24, et seq. [,]" Id. at 4, and "U. R. Civil P. 34 [,] Iomed Mem. at 10, and the provisions of "UTAH CODE ANN. § 78-7-5 and Utah Constitution Art. VIII § 5[,]" Iomed Mem. at 10, none of which require notice or an opportunity to be heard or require any post-seizure hearing upon a seizure. On April 15, 2002, the writ of Assistance was procured by Matkin, presumably under the same state laws.

182. The laws of the state of Utah contain laws, such as under UTAH Civ. P. 65A and Utah R. Civ. P. 648, which afford constitutional due process protections where ex parte relief in the seizure of property or injunctive relief for the preservation of evidence may be sought. The defendants deliberately and consciously avoided use of those procedures and, in the obtaining of the Search Order and Writ of Assistance, execution thereon, and search of Moss' Home and seizure of her property, under color of the state law provisions they invoked, actively sought to commit, and succeeded in committing a fraud upon the state court and Moss, and otherwise misused the laws upon which they relied, in the course of inducing state action in the issuance of the Search Order and Writ of Assistance, all of which was in violation of Moss' right to procedural due process of law, and which allowed Moss' liberty and property interests to be infringed without due process of law, as set forth above.

Supreme Court, U.S.
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No. 05-940

In the Supreme Court of the United States

JAMAL YANAKI; SUSAN I. MOSS,
Petitioners,

v.

PARR WADDOUPS BROWN GEE & LOVELESS, a Utah professional corporation; CLARK WADDOUPS; JONATHAN O. HAFEN; JUSTIN P. MATKIN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Tenth Circuit Court of Appeals correctly apply *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), in holding that a plaintiff does not state a claim under 42 U.S.C. § 1983 against a private party for a constitutional deprivation "under color of law" where the plaintiff only alleges (1) private misuse of a state statute or rule to obtain an ex parte court order, and (2) execution of that order by a law enforcement officer?

2. Did the Tenth Circuit Court of Appeals apply the correct pleadings standard in reviewing a motion to dismiss?

RULE 29.6 DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation that owns 10% or more of Parr Waddoups Brown Gee & Loveless.

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INTRODUCTION

Petitioners have asked this Court to review a fact-bound determination by the Tenth Circuit Court of Appeals correctly applying well-settled precedent from this Court. Contrary to Petitioners' contentions, the Tenth Circuit's opinion in this case is neither novel nor surprising; it involves facts that are essentially indistinguishable from those presented to this Court in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982)—a case in which this Court concluded that a private party does not act under color of law, and therefore is not subject to liability under 42 U.S.C. § 1983, when he obtains an allegedly unlawful court order that directs a law enforcement officer to execute that order.

Like the plaintiff in *Lugar,* Petitioners did not challenge the constitutionality of any state statute or state-created right; they merely alleged that Respondents misused legitimate statutes and rules and obtained an excessive court order, which directed a state official to execute the order consistent with the official's statutory duties and pursuant to the direction of the court. There is no question that such facts fail to meet the state action test articulated by this Court in *Lugar*, as it has been consistently applied by the Circuit Courts, including the Tenth Circuit's ruling here.

Petitioners obviously disagree with this Court's settled precedent, as well as the Tenth Circuit's proper application of that precedent to the particular facts of this case. They seek a sweeping expansion of § 1983 liability and, at their most extreme, a declaration that police officers are free to ignore court orders based on whether the individual officer believes those orders are constitutional. This Court wisely declined to follow that path more than twenty years ago in *Lugar*, and the Tenth Circuit's proper application of that precedent in this

case does not warrant this Court's review. The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

1. Summary of Facts. On April 12, 2002, Respondent lawyers Clark Waddoups, Jonathan Hafen, and Justin Matkin of the Respondent law firm Parr Waddoups Brown Gee & Loveless, obtained an ex parte order on behalf of their client to conduct immediate discovery to prevent the destruction or alteration of evidence (the "Court Order" or "Order"). *See* Pet. App. at 43a, ¶ 8. This Court Order authorized the Salt Lake County Sheriff's Office to search Petitioner Jamal Yanaki's residence and seize computer hard drives and confidential files found there, with Respondents' assistance. *See id.* at 44a, ¶ 11.

When Respondents attempted to execute the Court Order on the morning of April 15, 2002, Petitioner Susan Moss refused to allow Mr. Matkin and a deputy sheriff access to Mr. Yanaki's residence. *See id.* at 47a, ¶¶ 20-21. As a result, Mr. Matkin obtained an additional ex parte writ of assistance, which authorized the use of "reasonable force" to execute the Court Order. *See id.* at 48a, ¶¶ 25-26. Mr. Matkin then returned to Mr. Yanaki's residence with three other individuals, at which time two accompanying deputy sheriffs proceeded to execute the Court Order. *See id.* at 49a-50a, ¶¶ 31-33, 35-36.

Following the execution of the Court Order, Petitioners filed suit against Respondents, alleging that they had violated Petitioners' civil rights by conducting an unreasonable search and seizure under color of state law in violation of 42 U.S.C. § 1983. *See id.* at 55a-57a, ¶¶ 168-182. Importantly, Petitioners did not allege that the Court Order was issued

pursuant to unconstitutional state statute or discovery rule. *See id.* Nor did Petitioners contend that Respondents privately sought out the deputy sheriffs for assistance outside of the execution of the Order. *See id.* Instead, Petitioners' allegations of state action were limited to the claim that Respondents had "misused the laws upon which they relied" and executed, with the assistance of the Salt Lake County Sheriff's Office, a seizure "conducted pursuant to orders from a state court judge." *Id.* at 56a-57a, ¶¶ 168, 182. Based on these allegations, Respondents filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See id.* at 27a.

2. The District Court Decision. After careful review, the district court granted Respondents' Rule 12(b)(6) motion to dismiss. In so doing, the district court noted the fundamental distinction this Court drew in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), between "court orders purportedly authorized by unconstitutional statutes and unconstitutional orders purportedly authorized by constitutional statutes." Pet. App. at 31a. The district court also observed the courts' extreme reluctance to extend liability under § 1983 for mere "private misuse" of a statute, especially "where the only infirmities are the excess of the court order itself." *Id.* at 32a (internal quotations omitted). Because Petitioners argued only that the Court Order was unconstitutional, rather than properly issued pursuant to an unconstitutional statute, the district court reasoned that Petitioners' claim alleged only a private misuse of a state statute, which the court explained does not constitute state action for purposes of § 1983 absent exceptional circumstances, such as where the underlying court proceedings are a complete nullity. *See id.* at 33a-34a. Since Petitioners did not allege either that the statute under which the Court Order was executed was unconstitutional or that the

state court proceedings under which the Court Order was issued were a complete nullity, the district court concluded that Petitioners had failed to plead the element of state action necessary to sustain a claim under § 1983 and dismissed their complaint. *See id.*

3. The Tenth Circuit Opinion. On appeal, the Tenth Circuit Court of Appeals affirmed the district court. *Id.* at 9a. Like the district court, Judge Murphy, writing for the majority, concluded that because Petitioners alleged nothing more than a "private misuse" of state laws, their complaint failed to satisfy the color of law test announced in *Lugar*. *See id.* at 8a. The majority considered and rejected, as inconsistent with *Lugar,* the assertion on which Petitioners base their petition to this Court; namely, that police involvement pursuant to a court ordered search alone is sufficient to expose private parties to § 1983 liability. *See id.* at 8a-9a. The majority also noted in its opinion that, "[a]t oral argument [Petitioners] admitted that there is no allegation in the complaint that the state laws upon which the [Court Orders] were based are facially unconstitutional. [Petitioners] had said as much in their complaint and in their briefs." *Id.* at 12a n.8 (citations omitted). Without any allegation that the deputy sheriffs had done more than simply discharge their official duties, the majority reasoned this case was factually indistinguishable from *Lugar*, in which this Court rejected the claim that a private party was acting under color of law where the party used a county sheriff to unlawfully execute of a writ of attachment. *See* Pet. App. at 8a-9a, 14a n.11. Judge Briscoe joined the majority opinion; Judge Holloway dissented. *See id.* at 20a-21a.

Following the court of appeals' ruling, Petitioners petitioned for an en banc rehearing. Six of the eight active

judges on the Tenth Circuit Court of Appeals voted to deny rehearing. *See id.* at 41a-42a. This petition followed.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit's Decision Correctly Applies *Lugar* to the Specific Facts of this Case and Is Consistent with this Court's Precedent.

There is nothing groundbreaking about the Tenth Circuit's decision in this case. Ruling on the particular allegations made by Petitioners, the Tenth Circuit made a fact-bound determination of well-settled law that follows directly from this Court's decision in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982). Petitioners' argument that the Tenth Circuit's decision is inconsistent with *Lugar* is simply confused, and, by focusing exclusively on the degree of police involvement, rather than its source, is based on an erroneous equivocation between the two distinct requirements for state attribution set forth in *Lugar*. As illustrated below, the Tenth Circuit correctly concluded that Petitioners' § 1983 claim is, in all relevant respects, essentially indistinguishable, both factually and analytically, from the claim that was dismissed in *Lugar*. This fact-specific application of *Lugar* does not warrant review by this Court.

In *Lugar*, the respondents sought a prejudgment attachment of the petitioner's property. *See id.* at 924. Under a state statute providing for such an action, respondents filed an ex parte petition and obtained a writ of attachment, which a county sheriff executed pursuant to that statute. *See id.* The petitioner subsequently filed suit against the respondents under 42 U.S.C. § 1983, alleging that the respondents had acted jointly with the State to deprive the

petitioner of his property without due process of law. *See id.* at 925.

Before addressing the petitioner's claim, this Court first explained that, to constitute action under color of law for purposes of § 1983, the conduct allegedly causing the deprivation of a federal right must be "fairly attributable" to the State. *See id.* at 937. *Lugar* identified two prongs to this "fair attribution" or "state action" requirement:

> *First*, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . *Second*, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

See id. at 937 (emphasis added). The distinction between these two prongs is critical, as Petitioners go to great lengths to collapse them in this case. In explaining the distinction, this Court made clear that the degree of participation or joint involvement of a state official relates *only* to whether an individual may be fairly said to be a "state actor" under the second prong of the state action test—e.g., "because he is a state official, *because he has acted together with or has obtained significant aid from state officials*, or because his conduct is otherwise chargeable to the State." *See id.* (emphasis added); *see also id.* at 938-39. This Court also made clear that while the two "state causation" and "state actor" prongs may "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions," such as a law enforcement officer, the two prongs "diverge when the constitutional claim is directed

against a party without such apparent authority, *i.e.*, ***against a private party.***" *See id.* at 937 (emphasis added).

Hence, under *Lugar's* analytical framework, where a § 1983 claim is asserted against a *private party*, as here, it is not enough for a plaintiff merely to show that the private party acted together with or obtained significant aid from law enforcement officers or other state officials. Such a showing may satisfy the second prong of the state action test, but it does nothing with respect to whether the constitutional deprivation was caused by some state-created right. To satisfy the first prong, the plaintiff must allege that the deprivation was caused by or could be "ascribed to a governmental decision." *See id.* at 937-38.

Nowhere is this distinction clearer than in the facts of *Lugar* itself. The petitioner in *Lugar* alleged two separate § 1983 counts in his complaint. Count two, like Petitioners' claim in this case, alleged that the respondents had unlawfully misused an otherwise constitutional state statute to deprive the petitioner of his property. *See id.* at 940. Count one, by contrast, alleged that the respondents had deprived the petitioner of property through the use of a constitutionally defective statute. *See id.* at 940-41. Addressing count two, the unlawful misuse of statute claim, this Court succinctly explained that the claim could not satisfy the first "state causation" prong:

> To say [that respondents' actions were 'unlawful' under state law] is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their